No. 91-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORMAN BOSEK,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Illinois Appellate Court, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the jury instructions given violated Bosek's constitutional rights to due process and trial by jury where the instructions failed to advise the jury of the presumption of innocence and proper burden of proof as to the offense of second degree murder and conflicted with precedent of this Court as to instructions which shift to the defendant the burden of proof as to mitigating factors.

II. Whether Bosek's rights to due process and trial by jury were violated when, in a prosecution for murder in which a defense of self-defense was raised, the trial court refused to instruct the jury on the theory of defense relating to the decedent's prior violent and aggressive behavior.

III. Whether the State failed to eliminate all reasonable doubt of Bosek's guilt.

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The parties before the Supreme Court and the parties below are identical except that the Illinois Attorney General was not a party to proceedings in the Illinois Appellate Court. Mr. Bosek was represented by other counsel at trial. In the appellate proceedings below, Mr. Bosek was represented by Mr. Lynch alone.

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OPINIONS BELOW

The Illinois Appellate Court for the Second District affirmed Bosek's conviction, in an opinion reported at 210 Ill. App. 3d 573, 569 N.E. 2d 551 (1991). The Illinois Supreme Court denied Bosek's petition for leave to appeal, in an order not yet published (A. 40). These opinions are reproduced in the appendix.

JURISDICTION

The opinion of the Illinois Appellate Court was filed on March 18, 1991. No petition for rehearing was filed. A timely petition for leave to appeal was filed in the Illinois Supreme Court on April 22, 1991. The petition for leave to appeal was denied, in an order entered on October 2, 1991.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), and this petition is timely, under Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . ."

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury . . ."

U.S. Const. amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Ill. Rev. Stat. ch. 38, § 7-1 (1987):

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend him-

self or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

Ill. Rev. Stat. ch. 38, § 9-1(a) (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987):

"A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another . . ."

Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987):

"(a) A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present . . .

(2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable . . .

(c) When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty

of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder."

STATEMENT OF THE CASE

Petitioner, Norman Bosek, is a mechanical engineer. He was employed at the Fermi National Accelerator Laboratory for over eleven years. Bosek had been continually employed since he graduated, from the University of Illinois, in 1963. He was the sole support of his family (C. 941-43). Co-workers and supervisors attested to his responsibility and excellent work performance (C. 1281-86). Bosek had no criminal record (C. 1293).

Bosek was married in 1962. He and his wife, Janice, had five children, ages 24 through 11. Mr. and Mrs. Bosek lived together from that time until November 21, 1988 (C. 941-42, 944). Mrs. Bosek did not work outside the home (C. 539). The family moved to Wayne, Illinois in

mid-1988 (C. 943). Wayne is a small, rural area in DuPage County, Illinois.

Michael, the Boseks' eldest son, introduced Lucien Gilbert to his parents in January 1988 (C. 495-96, 944-45). Thereafter, Bosek saw Gilbert several times (C. 945-47).

In August 1988, Bosek found Gilbert at the Bosek home, shooting a .357 Magnum in the backyard. While Gilbert stopped at Bosek's request, Bosek learned that Gilbert had been there shooting three or four days earlier (C. 947-48).

Gilbert made a practice of carrying the .357 Magnum. Although he was not authorized to do so, Gilbert routinely kept the .357 Magnum with him while on duty as a security guard (C. 1067-68, 1071-72, 1077-78). He would set booby traps in the areas he was guarding, a practice which was neither authorized nor customary (C. 1068-69). Gilbert was ultimately fired, as a result of this behavior, death threats Gilbert made against a customer of the security firm, and his use of alcohol while working (C. 1067, 1072-74). Gilbert was a very heavy drinker (C. 558-59, 1053). When he drank, he had a bad temper (C. 1058-59).

When Bosek saw Gilbert, Gilbert was typically dressed in combat boots, with khaki pants, and a bandanna around his head. Gilbert also carried a hunting knife, with a 12-inch blade (C. 948-49, 1104). Gilbert was known, to coworkers, and Mrs. Bosek, by the nickname "Rambo" (C. 563, 1087).

On Friday, September 16, 1988, Mrs. Bosek told her husband that she wanted to marry Gilbert (C. 949-50). Mrs. Bosek and Gilbert had been having an affair for several months, unbeknown to Bosek (C. 571-73, 575). Bosek attempted to save the marriage; he talked to his

wife about it all weekend, he asked her to see a priest, and he began trying to be especially nice to his wife (C. 587, 600-01, 950-52, 956-57). After that weekend, Mrs. Bosek began to have mixed emotions about the affair (C. 589).

The following Monday, September 19, 1988, Bosek received a call at work from Gilbert. Gilbert told Bosek that there was nothing Bosek could do about the affair, and that the two men would have to settle it between them. Gilbert stated: "we can settle it with guns or knives and . . . we are going to settle it with guns. We are going to have a 'shoot-out at the OK Corral'. . . . "I am coming to get you" (C. 953-54).

Bosek hung up the phone and immediately reported this threat to Wayne police (C. 816-19, 953-54, Def. Ex 31). The officer who took the complaint testified that, at that time, Bosek expressed fear that Gilbert might be at the Bosek home that night and that there might be an altercation (C. 818-19).

Nothing occurred that night. However, after the call, Bosek began keeping a loaded .38 revolver in his dresser drawer (C. 955).

Two and a half weeks later, Gilbert called Bosek at home. Gilbert said that he had fought in Vietnam and was not going to be pushed around by anyone. Gilbert told Bosek that he was going to come and get Bosek (C. 958-59). Bosek called the Wayne police. Receiving no answer, as the number he dialed was not a 24-hour number, Bosek went to the Wayne police station, but no one was there. There was a sign on the door, which gave a number to call after 5:00 p.m. Bosek wrote that number down and returned home (C. 958-59). In the interim, Mrs. Bosek, who knew of the call, telephoned Gilbert and told him not

to come (C. 605, 959). Mrs. Bosek told her husband of this when he returned, and Gilbert did not come over that day (C. 959-60). Bosek got his gun, put it in his pocket, and walked around the house with it for a while. He took no other action (C. 959).

Gilbert called Bosek again in October 1988. During that conversation, Gilbert told Bosek that he had killed in Vietnam and could do it again. Gilbert told Bosek that he was coming to get Bosek and that he, Gilbert, had his gun loaded. Bosek hung up; the call made him nervous (C. 961).

Gilbert called frequently after that; each time, once he knew it was Gilbert, Bosek hung up the phone (C. 960-61).

Gilbert wrote Mrs. Bosek many letters (C. 506). In one letter, Gilbert told Mrs. Bosek to "tell Norman I'm going to be there" (Def. Ex. 30). In another letter, Gilbert stated that he had been cut off in traffic. Gilbert indicated that he wanted to give the other driver "a first class face lift", and track him down and beat him (C. 616-18; Def. Ex. 21). Following a disagreement with Mrs. Bosek's brother, Phil Rysinka, Gilbert wrote that Gilbert would "rip (Rysinka's) lips off" and show Rysinka "what it's like to spill blood, because I have gone through gallons" (C. 620-21; Def. Ex. 22).

Mrs. Bosek continued her affair with Gilbert (C. 610-11, 962-63).

On November 8, 1988, Gilbert wrote a letter to the Boseks' 24-year old son Michael, asking Michael to get certain documents which Gilbert wanted to have to use against Bosek in contemplated divorce proceedings between the Boseks (C. 608-10, Def. Ex. 23). Michael did not respond (C. 1105).

Thereafter, Gilbert called Michael at work and demanded the records. Michael was angry and afraid (C. 1106-09).

Gilbert wrote another letter, which Michael received on November 19, 1988. Michael was so upset by this letter that he telephoned his father, who was at a party at a friend's home, and told Bosek that he was afraid (C. 973-74, 1089, 1092, 1109-11). The next day, Sunday, November 20, Michael showed the letter to his parents (C. 1111-12). Bosek read the letter (C. 975). In the letter, Gilbert told Michael:

> "Michael, you declared war on me . . . I have enough firepower to wipe out 20 people with one flick of the wrist. Don't think for a second I won't use it . . . I had to kill people for real and I'm not going to be intimidated by some 23-year old punk who doesn't know what it's like to cut another man's throat or blow off another man's head . . . Come and get me . . . You (i.e. Michael, Rysinka and Bosek) should join forces and come after me. I need a good excuse to go on a killing rampage again and you guys could provide me with that opportunity . . . The consequences could be fatal . . . I'll send you a hand grenade just to even things up . . ." (Def. Ex. 26).

Bosek told his son that they would take the letter to Bosek's attorney (C. 977, 1113). Bosek decided to go to the attorney, rather than the police, as nothing had happened when he reported the prior threats to police (C. 977).

The next morning, November 21, 1988, Bosek went to work (C. 977).

At 10:30 a.m., Gilbert went to the Bosek home. Mrs. Bosek let him in. Gilbert was wearing a holster with a gun in it (C. 510, 513). Gilbert was drinking beer out of a Tupperware container (C. 559-60).

Gilbert showed Mrs. Bosek a rifle (C. 513). This rifle was an AK-47, an extremely powerful semi-automatic weapon (C. 873, 886-88, 897). Gilbert bought this weapon, and 90 rounds of ammunition, on November 13, 1988 (C. 937). The gun's magazine held 30 cartridges (C. 873-74). An AK-47 is capable of being converted to a fully automatic weapon; when so converted, the weapon can discharge 30 rounds of ammunition in less than three seconds (C. 885-86). Although this particular AK-47 was in a semi-automatic mode (C. 873-74), a person standing several feet away would have no way of knowing whether the rifle was fully automatic or not (C. 886).

Mrs. Bosek and Gilbert left the house in Gilbert's car, a Chevette hatchback (C. 164, 389-90, 514). They went to the Pratt Wayne forest preserve, arriving about 11:30 a.m. (C. 516-17). They sat in the car for a time (C. 519).

Bosek came home for lunch at about 11:30 a.m. Finding no one home, he drove to the store and then the post office, thinking that he wife might have gone shopping or to get the mail (C. 977-78). When he did not find his wife, Bosek figured that she was either with her sister or with Gilbert. He was concerned that, if she were with Gilbert, Gilbert might be at the home when Bosek returned (C. 979-80). As he feared a confrontation with Gilbert, Bosek put his gun in a compartment in the driver's side door of his car, so it would be accessible to him (C. 979-82).

Bosek left the house around noon and went to look for his wife. At that time, he did not know where she was. He drove past a couple of restaurants, where he thought she might be if she were with her sister (C. 982-83).

He then drove into the Pratt Wayne Forest Preserve. As he entered, he saw Gilbert's car. Gilbert was in the

driver's seat. Mrs. Bosek was sitting next to him (C. 983-86). This was about 12:20 p.m. (C. 519).

Mrs. Bosek saw Bosek approaching. She said to Gilbert "there's Norm" (C. 519-20).

Bosek saw Gilbert look at him (C. 985-86). Gilbert immediately got out of his car and proceeded to the back of it (C. 520, 727, 986). Mrs. Bosek, who assumed that the AK-47 and the .357 Magnum were in the car, said as Gilbert got out, "don't shoot Norm" (C. 728).

Bosek pulled up behind the Chevette (C. 521, 986). He attempted to roll his window down, to call his wife and take her home. As the window stuck, he opened the door, got out, and called to his wife. Mrs. Bosek was still in Gilbert's car (C. 986). She indicted that she remained in the Chevette for a while and that she heard voices. She could not understand what was being said (C. 521).

Bosek testified that, at this point, Gilbert had opened the hatchback of his car and was holding the AK-47 (C. 987). Gilbert's back was to Bosek, but Bosek saw the AK-47, with the clip in it, and Bosek saw Gilbert moving some lever on the gun (C. 987-89). Seeing the clip and considering Gilbert's weapon to be a machine gun, Bosek got out his gun and shot at Gilbert as fast as he could (C. 989). About three seconds passed between the time Bosek saw Gilbert with the gun in his hands and the time he shot Gilbert (C. 989). Bosek testified that Gilbert fell back, with his arms at his sides and the rifle across his knees (C. 990).

Bosek watched Gilbert for a few seconds and he was not doing anything. Then Bosek was distracted by his wife, who had exited the Chevette, and was running around screaming (C. 990-91).

Bosek testified that his attention was then drawn back to Gilbert. He saw Gilbert move his right hand toward the rifle. Bosek then shot Gilbert again (C. 991). Fifteen to thirty seconds passed between the first shot and the second shots (C. 173, 398-400, 424-25, 528). As he saw no indication that Gilbert had been hit, Bosek retreated behind his car (C. 991).

Mrs. Bosek stated that, when she got out of the Chevette, she saw Bosek standing near his car, a Lincoln Continental, with the gun in his hand. The hatchback of the Chevette was raised, and Gilbert was leaning into the hatchback (C. 522, 740). According to Mrs. Bosek, Bosek first pointed the gun at her, then moved and pointed it at Gilbert (C. 523). She did not tell this to police (C. 732-33). At the time of the first shot, the hatchback was open and Gilbert was leaning into it (C. 740). While Mrs. Bosek said that she did not see a weapon, she could not see Gilbert's hands. She was watching Bosek, not Gilbert (C. 740).

After the first shot, Mrs. Bosek ran to a nearby car to get help (C. 526). She did not see a rifle at that time. However, she did see the rifle over Gilbert's legs below his knees, when she returned (C. 529-31).

Mrs. Bosek had not seen Gilbert move prior to the second two shots (C. 525-26, 528). However, she had gone to several cars in an unsuccessful attempt to get help (C. 529-30).

Mrs. Bosek indicated that, when she saw the rifle over Gilbert's legs, she moved it, trying to get it off of his legs. However, as it was heavy, she was only able to move it a little way (C. 530-31, 743). Mrs. Bosek also moved Gilbert's right arm (C. 742-43, 747).

Other people were in the area at the time. The first thing Kristian Johnson noticed was a cracking sound (C. 163-66, 179-80). He then saw Gilbert lying on his back behind the Chevette and Bosek, with a gun in his hand, standing nearby (C. 167). At that time, Johnson did not see anything in Gilbert's hands or on the ground (C. 168-69). Johnson saw Bosek lower his arm and heard 3-4 more shots (C. 171). Johnson had not seen Gilbert move (C. 173). However, Johnson was concerned for his own safety; after hearing the first gunshot, began to quickly leave the area. He was not looking around (C. 171, 182-83). As Johnson drove away, the Lincoln Continental was between him and the two other men (C. 184).

Brenda Cash was with Gary Smythe, in Smythe's car. They were parked 50-75 feet from the Chevette (C. 389-90, 422-24).

Cash and Smythe were talking (C. 424). Cash saw Gilbert exit his vehicle and go to the back of it. She did not see anything in his hands. She saw Bosek with a gun, standing outside of his car. Cash heard arguing (C. 393-96). Cash then began looking at Smythe (C. 398). She did not tell him anything about a gun (C. 412, 437-38). Cash heard a pop and looked back. Cash saw Bosek with his gun pointed down. She could no longer see Gilbert. She heard two more pops (C. 398-400). As Smythe drove away, Cash did not see a weapon near Gilbert (C. 400-02). However, she did not notice that the hatchback was up (C. 410). Cash was not looking at the scene at the time of the first pop. When Cash heard the other two pops, she could not see Gilbert at all (C. 411-13). She also was scared (C. 414).

Smythe heard the shots, but he did not witness the shooting (C. 424-25, 438-39). As he drove away, Smythe saw that the hatchback was raised (C. 441-42).

Johnson and Smythe drove to the ranger's station, a quarter mile away, and reported the incident (C. 174, 416, 427, 430). When they returned to the parking lot, Johnson, Cash, and Smythe noticed the rifle lying across Gilbert's legs (C. 175-76, 403, 432).

After the shooting, Bosek stayed behind his car for about ten seconds. He then asked his wife to go with him to the police station (C. 532, 744, 992). She refused. Bosek, thinking that something should be done quickly, got into his car and began driving toward the Wayne police station, which was nearby (C. 745, 992).

Upon leaving the forest preserve, Bosek saw a police car. He stopped, got out, and told the officer, Officer Read, that he had just shot a person. Bosek told Read that the man might still be alive and to call an ambulance. Bosek led Officer Read back to the parking lot (C. 773-75, 992-94).

Both Officer Read, and paramedics, who were dispatched at 12:29 p.m., saw Gilbert lying on the ground, with his feet near the rear of the hatchback, and a rifle across his legs (C. 447, 776-77). Read stated that the rifle was about three inches above Gilbert's ankles (C. 780). The paramedic testified that the gun was midway between Gilbert's knee and ankle, with the butt of the gun to his right (C. 448).

Read took the rifle and placed it in the hatchback (C. 784-85). The hatchback was open, and a revolver was also there (C. 456, 779; *see* C. 480).

According to investigating officers, when questioned at the scene, Bosek told police that the incident was not an accident (C. 482). One officer, who was walking past another officer who was questioning Bosek, stated that he

heard Bosek say he intended to do something like this (C. 829). The officer questioning Bosek, however, testified that, although Bosek said something, he could not hear what it was (C. 482). At the station, Bosek told police that Gilbert had threatened his son and that if he, Bosek, "would have waited a couple seconds longer, (he) would be the one lying on the ground" (C. 489).

Gilbert died due to the second set of gunshot wounds (C. 695, 700-01, 704). The first wound would not have caused death (C. 666, 705). Gilbert's blood alcohol content was found to be .22, over twice the level at which, in Illinois, intoxication is presumed (C. 702-03 706).

The first shot hit Gilbert's spinal cord (C. 653-56, 694, 697-99). It would have paralyzed him from mid-chest down (C. 660). However, Gilbert would have retained the use of his arms (C. 669). While he would not have actually been able to reach a rifle between his knees and ankles (C. 666), if he reached the rifle, he could have used it (C. 673). Further, an observer would not have had any idea of the nature and extent of the injury (C. 670).

Bosek was charged with first degree murder (C. 3-6), *i.e.* an intentional homicide, without justification. Ill. Rev. Stat. ch. 38, § 9-1 (a) (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987). Following a jury trial, Bosek was convicted of second degree murder (C. 80), a killing performed under an unreasonable belief that the action is justified as self-defense. Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987).

Bosek's trial attorney tendered a jury instruction that evidence of Gilbert's violent and aggressive character could be considered, along with the other facts, to show who was the aggressor. The trial court refused this instruction, as it was not a pattern instruction, Illinois Pat-

tern Jury Instructions (IPI), Criminal (2nd ed. 1981), and as it singled out one aspect of the case (C. 1131-33). The jury was instructed, over defense objection, as to the use of force by an aggressor (C. 74-75, 1128-31). Trial counsel also preserved issues as to the sufficiency of the evidence (C. 127, 1160-61).

Substitute counsel appeared for Mr. Bosek in the trial court and presented, with leave of court, further post-trial motions (C. 129-38), which raised additional issues as to the trial court's failure to instruct the jury on the State's burden of proof, and the presumption of innocence, on second degree murder (Supp. Rec. C. 1, 4-5).

Bosek's post-trial motions were denied. He appealed (C. 155), raising the above issues, and others, including ineffective assistance of counsel.

The Illinois Appellate Court for the Second District affirmed. The appellate court rejected Bosek's reasonable doubt argument on the theory that the State's evidence, if believed, established that Gilbert was not going to fire his rifle or that, even if he wished to, he was unable to fire it (Appendix ("A.") 31). The appellate court rejected Bosek's argument that the jury should have been instructed on his theory of defense, on the same grounds as the trial court (A. 32-33).

Given trial counsel's failure to otherwise object to the instructions, the appellate court found the issue as to the propriety of the instruction on second degree murder waived. However, before reaching that conclusion, the appellate court considered whether or not the jury was properly instructed (A. 27-30). This analysis was required by the Illinois plain error rule, under which errors not properly preserved at trial are not waived if they are plain errors affecting substantial rights. Illinois Supreme Court Rule 615 (a); *see* Supreme Court Rule 451 (c).

The Court concluded that, because the jury was advised of the presumption of innocence and burden of proof as to first degree murder, no similar instructions were required as to second degree murder (A. 29). The court noted that the jury was supposed to find the defendant guilty of first degree murder before considering whether he was guilty of second degree murder (A. 29). The appellate court also noted the statutory provision that the burden of proof remained upon the State to show a lack of justification (A. 29).

Bosek filed a petition for leave to appeal to the Illinois Supreme Court, raising each of the above issues. That petition was denied, without opinion (A. 40).

Bosek seeks a writ of *certiorari* from this Court.

REASONS FOR GRANTING THE WRIT

I.

The jury instructions given violated Bosek's constitutional rights to due process and trial by jury where the instructions failed to advise the jury of the presumption of innocence and proper burden of proof as to the offense of second degree murder and conflicted with precedent of this Court as to instructions which shift to the defendant the burden of proof as to mitigating factors.

The presumption of innocence is a basic component of a fair trial, the enforcement of which lies at the foundation of our judicial system. *Taylor v. Kentucky*, 436 U.S. 478, 479, 483 (1978); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Coffin v. United States*, 156 U.S. 432, 453 (1895).

A jury must be instructed on the presumption of innocence, in order to insure that the jury is apprised of the importance of the defendant's right to have his or her guilt determined solely on the basis of the evidence presented at trial. *Taylor*, 436 U.S. at 484-86. The instruction provides the lay juror with important guidance, by cautioning the juror to disregard all of the suspicion which arises from the charges against the defendant. *Taylor*, 436 U.S. at 484.

An instruction on the presumption of innocence is required even where the jury is instructed that the prosecution bears the burden of proving the elements of the offense beyond a reasonable doubt. *Taylor*, 436 U.S. at 488-89; *Coffin*, 156 U.S. 432, 155 S.Ct. 394, 402-03. This is because the presumption of innocence serves the unique function of requiring an acquittal of the defendant, unless the prosecution meets its burden of proof. *See Coffin*, 155 S.Ct. at 404.

It is also axiomatic that, in order to obtain a conviction, the prosecution must prove each and every element of the offense, beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). This fundamental rule, constitutionally required by due process guarantees, is the primary safeguard for reducing the risk of an erroneous conviction. *Cage v. Louisiana*, 111 S.Ct. 328, 329 (1990); *Winship*, 397 U.S. at 363. The reasonable doubt standard provides concrete substance for the presumption of innocence, the bedrock principle of our jurisprudence. *Winship*, 397 U.S. at 363.

In this case, the jury was instructed as to the elements of first and second degree murder (A. 44-45). The jurors were told that the State had the burden of proving first degree murder and that, if the State met this burden,

Bosek would have the burden of proving, by a preponderance of the evidence, the presence of a mitigating factor (A. 42). The instructions informed the jurors that they could return a verdict of not guilty, guilty of first degree murder, or guilty of second degree murder (A. 43). The instructions advised the jury that Bosek was presumed to be innocent of the charge of first degree murder (A. 42; C. 1253). The jury was never instructed that the presumption of innocence also applied to the offense of second degree murder (C. 1249-61).

While reversal is not automatically required in every case in which an instruction on the presumption of innocence is omitted, the omission of such an instruction may well warrant reversal, depending on the totality of the circumstances. *Kentucky v. Whorton*, 441 U.S. 786, 789-90 (1979). These circumstances include the instructions given, the arguments made, the weight of the evidence presented, and other relevant factors. *Whorton*, 441 U.S. at 789. Several members of the Court have concluded that an instruction on the presumption of innocence is constitutionally required in every case. *Whorton*, 441 U.S. at 791 (Stewart, Brennan, Marshall, J.J., dissenting). The importance of such an instruction remains clear. *See Taylor*, 436 U.S. 478.

In this case, a separate instruction on the presumption of innocence as to the offense of second degree murder was necessary to ensure that Bosek received a fair trial.

The evidence against Bosek was far from overwhelming. Under Illinois law, the difference between a homicide justified by self-defense, and warranting acquittal, and second degree murder depended upon the reasonableness of the defendant's belief, based on the circumstances confronting the defendant at the time, that his conduct was

necessary for his own safety. *See* Ill. Rev. Stat. ch. 38, § 7-1, 9-1 (a), 9-2 (a) (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987); *see People v. Scott*, 97 Ill. App.3d 899, 902-03, 424 N.E.2d 70 (1981). That was the pivotal issue here. Bosek shot a man who had threatened him and his son several times. Gilbert routinely carried weapons. Before the first shot was fired, Gilbert had seen Bosek approaching, jumped out of his car, and was reaching into the open hatchback of his vehicle. In that area, in addition to a .357 Magnum, Gilbert had a loaded AK-47. Bosek testified that he saw Gilbert with the AK-47 before he fired the first shot. Bosek testified that he fired the second shot, seconds later, after seeing Gilbert reach for the AK-47 which was on Gilbert's legs. Medical testimony indicated that Gilbert was capable of moving his arms. This powerful weapon was seen, and moved further down Gilbert's legs, by Mrs. Bosek when she returned to the area seconds later, and seen by police and paramedics. Even assuming, *arguendo*, that this evidence could be considered sufficient, it is far from overwhelming.

The jury was not instructed as to the presumption of innocence for the offense of second degree murder. However, the fact that the jury was expressly instructed that the defendant was presumed innocent of first degree murder may well have suggested to the jurors that this same presumption did not apply to the offense of second degree murder. Thus, this is not simply a case in which an instruction on the presumption of innocence was omitted, but rather one in which the instructions given may well have misled the jurors into believing that the presumption did not exist.

The arguments exacerbated the problem. The prosecutor's argument focused, in large part, upon the credibility of Bosek's testimony that Gilbert moved, prior to the sec-

ond set of shots. The prosecutor asserted that Bosek was lying, that he could have put the rifle on Gilbert's legs himself, and that Gilbert was incapable of moving after the first shot. The prosecutor also asserted that any motion by Gilbert was not sufficient to justify Bosek in shooting him a second time (C. 1183-84, 1187, 1195-200). The defense countered by arguing that Bosek's conduct was reasonable self-defense (C. 1202, 1226-30).

The issue here is not whether or not the prosecutor's arguments were improper; rather, the issue is the impact of the arguments and the corresponding importance of an instruction on the presumption of innocence. *Taylor v. Kentucky*, 436 U.S. 478, 487 n. 14 (1978). The focus of the arguments, particularly the prosecutor's, suggested that Bosek had to establish his innocence, and that the jury could convict him if he had not done so. Therefore, an instruction on the presumption of innocence was necessary to insure that Bosek received a fair trial. *Taylor*, 436 U.S. at 486-90.

The instructions given were also constitutionally defective in the way in which they shifted the burden of proof to the defense. Given the fundamental nature of the requirement that the prosecution bear the burden of proving guilt beyond a reasonable doubt, this Court has rejected, as violative of due process and the right to a jury trial, instructions which tend to reduce the prosecution's burden of proof. *Cage v. Louisiana*, 111 S.Ct. 328 (1990); *Carella v. California*, 491 U.S. 263 (1989); *Cool v. United States*, 409 U.S. 100 (1972). The critical issue is not how a reviewing court would interpret the instructions, but rather how a reasonable juror might have interpreted the instructions as a whole. *Cage*, 111 S.Ct. at 329-30; *Francis v. Franklin*, 471 U.S. 307, 316 (1985). Constitutional error arises if the jury might have understood the instructions to either

create a presumption or to shift the burden of persuasion on an element of the offense. *Carella*, 109 S.Ct. at 2421; *Francis*, 471 U.S. 307; *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The instructions here advised the jury of the elements the State was required to prove to obtain a conviction for first degree murder. They then advised the jury that, if it found those elements were proven, to continue deliberating, to determine whether a mitigating factor had been proven, such that Bosek was guilty of the lesser offense of second degree murder. The jurors were told that the State's burden was one of proof beyond a reasonable doubt. The instructions then advised the jurors that the defendant had the burden of proving, by a preponderance of the evidence, the existence of a mitigating factor (A. 44-45).

With regard to the contested element, of justification, the jurors were instructed:

1) that a lack of justification was an element of the State's proof (A. 44);

2) that the mitigating factor, which Bosek was required to prove by a preponderance of the evidence, was that he believed that the circumstances justified the deadly force he used, but that his belief was unreasonable (A. 44-45).

The jury was also given a definition of the justifiable use of force and instructed at some length on the lack of justification for the use of force by an aggressor, or someone who provokes the use of force against himself (C. 74-76). Illinois Pattern Jury Instructions (IPI), Criminal Nos. 24-25.06, 24-25.09, 24-25.11 (2d ed. 1981).

The standard of preponderance of the evidence was defined for the jurors; reasonable doubt was not (C. 70). IPI Criminal No. 4.18 (2d ed. 1981, 1987 Supp.).

The error in these instructions is that they did not clearly guide the jury on what standard to employ in assessing the reasonableness of Bosek's belief that his action was justified.

As noted above, this was the pivotal issue in this case. The jury clearly found that Bosek believed that he was in danger.

However, the jurors were basically told that, once having found that Bosek had that belief, they had to convict him of second degree murder, if they found that his belief was unreasonable (A. 44-45). The jurors were never clearly told what to do if they had a doubt as to the reasonableness of his belief or how to evaluate evidence concerning his belief. *See Martin v. Ohio*, 480 U.S. 228, 238-40 (1987) (Powell, Brennan, Marshall, Blackmun, J.J., dissenting). Evidence which might suffice to create a reasonable doubt on the elements of the State's case may fall short of proving an affirmative defense by a preponderance of the evidence. *See Martin v. Ohio*, 480 U.S. 228, 234 (1987). Such evidence, however, warrants acquittal, under the principle that the State must prove its case beyond a reasonable doubt as to each element of the crime charged.

Under the instructions given to this jury, once having reached the issue of second degree murder, the jury had only two options, to convict Bosek of first degree murder or to convict him of second degree murder. The jurors were not clearly given the constitutionally required alternative of acquitting Bosek if they had a doubt as to the reasonableness of his belief, or if they disagreed on the reasonableness of his belief.

By thus failing to afford the defendant the full benefit of the presumption of innocence, the instructions here cannot pass constitutional muster. *See Cool v. United States*, 409 U.S. 100 (1972). Although these instructions do not

specify an express presumption as to an element of the offense, there remains a risk that the jurors might have erroneously concluded that they had to convict Bosek of some offense, even if a doubt remained as to the reasonableness of his belief or even if some jurors viewed his belief as reasonable and others did not. *See Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979). Either way, the proper result was acquittal, consistent with the requirement that the State prove all elements of the offense beyond a reasonable doubt. *See Sandstrom*, 442 U.S. at 523-24; *see also Yates v. Evatt*, 111 S.Ct. 1884 (1991); *Francis v. Franklin*, 471 U.S. 307 (1985).

Significantly, the confusion was exacerbated by the court's oral charge to the jury. Although the written instruction stated that the jury should find Bosek not guilty if any one of the elements of first degree murder was not proven (A. 44), the court, in its oral charge, stated:

> "(i)f you find from your consideration of all the evidence that *each* one of these propositions *has* been proved beyond a reasonable doubt, you should find the defendant not guilty"

(C. 1256-57) (emphasis added).

Thus, Bosek's jury was never clearly and correctly told what findings would warrant acquittal.

The appellate court failed to analyze these issues. Rather, the appellate court looked to whether the instructions given accurately stated the law under the new Illinois homicide statutes. Upon concluding that they did, the appellate court found that the instructions were not erroneous. Having reached this conclusion, the appellate court found that the issue was waived (A. 28-30).

Under Illinois law, the failure to tender jury instructions on an issue, or to interpose a contemporaneous ob-

jection at trial to instructions given, waives errors in instructions, unless the error is a substantial defect and the interests of justice require consideration of the issue. Supreme Court Rule 451 (c); *People v. Flowers*, 138 Ill. 2d 218, 232, 561 N.E. 2d 674 (1990). The Illinois courts will apply this exception to the waiver rule when, *inter alia*, the error in instructions might have affected the outcome or where the instructions fail to correctly set forth the State's burden of proof. *See People v. Reddick*, 123 Ill. 2d 184, 526 N.E. 2d 141 (1988); *People v. Daniel*, 191 Ill. App. 3d 837, 844-45, 548 N.E. 2d 354 (1989); *People v. Vincent*, 165 Ill. App. 3d 1023, 1030-31, 520 N.E. 2d 913 (1988). This Court utilizes a similar standard, which allows for review of issues as plain error. *See generally, Lopez v. United States*, 373 U.S. 427, 436 (1963).

Applying these standards, and given the nature of the error in instructions here, consideration of the merits of this issue was warranted. Further, because the appellate court did consider the merits of this issue, in conducting its plain error analysis, this Court could reach the issue as well. *See generally, Connecticut v. Johnson*, 460 U.S. 73, 80 n. 8 (1983) (reviewing, on the merits, an issue which was waived, but which the state courts reviewed on the merits).

The instructions given to the jury here reflect recent changes in the Illinois homicide statutes. Under the new statutory scheme, the defendant has the burden of production, and of persuasion, by a preponderance of the evidence, as to the mitigating factors which would warrant a reduction in the degree of the offense from first, to second, degree murder. Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987); *People v. Shumpert*, 126 Ill. 2d 344, 351-52 (1989). While the new statute still leaves the State with the burden of proving the elements of first degree murder, beyond a reasonable

doubt, the State is no longer required to prove, beyond a reasonable doubt, the absence of the factors in mitigation in order to obtain a conviction for first degree murder. *Shumpert*, 126 Ill. 2d at 351-52. This is a departure from prior Illinois law. *See People v. Ellis*, 107 Ill. App. 3d 603, 610, 437 N.E. 2d 409 (1982). The new statute also provides that the burden of proof, beyond a reasonable doubt, remains on the State with regard to the offense of second degree murder. Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987). This is consistent with case law holding that a defendant may only be convicted of a lesser offense if he or she is proven guilty of all of the elements of that lesser offense. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982); *People v. Fausz*, 95 Ill. 2d 535, 449 N.E. 2d 78 (1983).

The instructions given here, however, do not make it clear that the State retains the burden of proof as to second degree murder.

Further, the instructions given run afoul of this Court's precedents as to when the burden of persuasion may be shifted to the defense.

Like the statutory scheme at issue in *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975), the new Illinois statutes distinguish, in levels of culpability, between those who kill in the presence or absence of a mitigating factor, *i.e.* a genuine but unreasonable belief that the killing is necessary to defend oneself. Ill. Rev. Stat. ch. 38, § 9-1, 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987). *Mullaney* held that it was constitutionally impermissible for the State, in such a situation, to shift to the defense the burden of proving the mitigating factor.

While other cases have found that other burden-shifting statutes could survive constitutional scrutiny, *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432

U.S. 197 (1977), the *Mullaney* principle has survived. In fact, this Court has considered the *Mullaney* holding to be so important to the goals of reducing the possibility that an innocent person would be convicted and overcoming an aspect of a criminal trial that substantially impaired the truth-seeking process, that the Court has given the *Mullaney* ruling retroactive effect. *Hankerson v. North Carolina*, 432 U.S. 233, 241-44 (1977).

Under *Mullaney*, the instructions given to this jury were constitutionally flawed, as they tended to shift the burden of proof to the defense on the key issue of justification. Under the instructions as given, as noted above, this jury may well have treated the burden as being on the defendant to persuade as to the reasonableness of his belief. If he failed to convince them that his belief was reasonable, this jury may well have concluded that a conviction was required, even if the evidence left a reasonable doubt as to the legitimacy of Bosek's belief.

Significantly, even under those cases in which the challenged statutory scheme shifted the burden of persuasion, the instructions given here would not suffice. In *Martin v. Ohio*, 480 U.S. 228 (1987), this Court expressly noted that the jury, to find guilt of any offense, had to be convinced that none of the evidence raised a reasonable doubt of guilt; further, the Court specifically noted that the jury was instructed that it could acquit if found the presence of an affirmative defense, by a preponderance of the evidence. *Martin*, 480 U.S. at 233. In *Patterson v. New York*, 432 U.S. 197 (1977), the jury instructions "focused emphatically and repeatedly on the prosecution's burden of proving guilt beyond a reasonable doubt." *Patterson*, 432 U.S. at 199-200, 200 n. 5.

The instructions here failed to do either. Bosek's jury was not clearly instructed that it had to acquit if, after considering the proof of mitigation, a reasonable doubt

about the existence of any element remained. This is a different, and far lesser, threshold than proof of the mitigating factor by a preponderance of the evidence. *See Martin*, 480 U.S. at 234.

Under all of these circumstances, the instructions given impermissibly deprived Bosek of the presumption of innocence and relieved the State of its constitutionally required duty to prove each and every element of the offense beyond a reasonable doubt. As the Appellate Court failed to apply the proper standards and failed to remedy this serious constitutional violation, *certiorari* should be granted to review this issue, particularly in light of the impact of the new Illinois homicide statutes.

II.

Bosek's rights to due process and trial by jury were violated when, in a prosecution for murder in which a defense of self-defense was raised, the trial court refused to instruct the jury on the theory of defense relating to the decedent's prior violent and aggressive behavior.

A defendant in a criminal case has an elementary right to present a defense to the trier of fact. *See generally, Herring v. New York*, 422 U.S. 853 (1975).

In this case, Bosek's defense was predicated largely upon evidence of the aggressive behavior and character of the decedent, Lucien Gilbert. Consistent with this position, Bosek's attorney sought to have the jury instructed that:

> "(e)vidence of the victim's aggressive and violent character may be considered by you along with the other facts and circumstances to show who was the aggressor"

(C. 83, 1131-33). This instruction was refused (C. 1131-33).

That instruction was an accurate statement of Illinois law. *See People v. Lynch*, 104 Ill. 2d 194, 199-200, 470

N.E. 2d 1018 (1984); *People v. Buchanan*, 91 Ill. App. 3d 13, 16, 414 N.E. 2d 262 (1980). It also states a principle historically recognized by this Court. *See e.g. Allison v. United States*, 160 U.S. 203 (1895); *Thompson v. United States*, 155 U.S. 271 (1894).

Particularly given the circumstances of this case, the refusal by the trial court to give this instruction deprived Bosek of his due process right to present a defense. Bosek's defense depended upon the reasonableness of his belief that he needed to use deadly force to defend himself. In this regard, Gilbert's violent and aggressive nature was highly relevant, to show both the reasonableness of Bosek's belief and the likelihood that Gilbert, not Bosek, was the aggressor. *See Lynch*, 104 Ill. 2d at 199-200, 470 N.E. 2d 1018. The instruction tendered, on this theory of defense, informed the jury that this was a legitimate matter for their consideration. The trial court's refusal to give the instruction thus tended to deprive Bosek of this theory of defense.

In this case, it was essential to the defense that the jury be clearly and distinctly advised of the use it could make of this evidence, given the critical nature of the evidence of Gilbert's character to the defense position. *Cf Allison*, 160 U.S. at 216. Further, the instruction held even greater importance in light of the instructions given, over defense objection, which tended to suggest that Bosek was the initial aggressor and which, consequently, limited the availability to him of a justification defense (C. 74-75, 103-06). Illinois Pattern Jury Instructions, Criminal Nos. 24-25.09, 24-25.11 (2d ed. 1981). The question of who was the aggressor was clearly in issue; the instruction tendered by the defense legitimately would have placed additional facts necessary for resolution of this issue before the jury.

III.

The State failed to eliminate all reasonable doubt of Bosek's guilt.

As noted above, the defendant in a criminal case has a fundamental constitutional right not to be convicted unless the prosecution proves him or her guilty beyond a reasonable doubt, on each and every element of the offense charged. *In re Winship*, 397 U.S. 358 (1970).

When a defendant raises a defense of justification, such as self-defense, in a prosecution for murder, the reasonableness of the defendant's conduct cannot be judged according to a standard of calm, detached reflection; rather, the reasonableness of the defendant's conduct must be assessed based on the circumstances confronting the defendant at the time of the homicide. *See Brown v. United States*, 256 U.S. 335 (1921); *see generally People v. Scott*, 97 Ill. App. 3d 899, 902-03, 424 N.E. 2d 70 (1981).

The facts of this case have been detailed in the Statement of the Case. In summary, those facts demonstrate that Bosek was confronted with an aggressive and violent man, who had threatened Bosek, and his son, before. Gilbert typically carried weapons. Bosek feared Gilbert. Upon seeing Bosek drive toward him, Gilbert got out of his car and was headed for an AK-47, a very powerful, semi-automatic rifle. For all Bosek knew, the rifle may well have been in an automatic mode, and, thus, the "machine gun", which Bosek perceived it to be. Gilbert was holding, or at least reaching for, this rifle, at the time of the first shot.

At the time of the second shots, Bosek had seen Gilbert moving his right arm toward the AK-47, which was across his legs. Bosek would have had no way of knowing that Gilbert would not have been able to reach the rifle, and Bosek reacted, in seconds, to the danger which he perceived.

Under these circumstances, it cannot be said that the State eliminated all reasonable doubt of guilt, and Bosek's conviction should have been reversed by the Appellate Court, consistent with the principles of *Winship*. The Appellate Court erroneously looked to what Gilbert actually could have done, not to Bosek's perception, and disregarded the fact that Gilbert was reaching for this highly dangerous weapon (A. 31). The Appellate Court thus failed to afford Bosek the protection of the standard of proof beyond a reasonable doubt.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner, Norman Bosek, respectfully requests that this Honorable Court grant *certiorari* to review the decision of the Illinois Appellate Court, Second District, and the denial, by the Illinois Supreme Court, of the petition for leave to appeal, and, upon such review, reverse his conviction or, in the alternative, reverse his conviction and remand for a new trial.

Respectfully submitted,

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No. 91-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORMAN BOSEK,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Illinois Appellate Court, Second District

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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Opinion of the Appellate Court of Illinois
Second Judicial District
No. 2-89-1151 — Filed March 18, 1991

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

NORMAN BOSEK,

Defendant-Appellant.

Appeal from the Circuit Court of Du Page County.
No. 88-CF-2486
Honorable John J. Bowman, Judge, Presiding.

JUSTICE WOODWARD delivered the opinion of the court:

Defendant, Norman Bosek, was charged in a four-count indictment with the offense of first degree murder (Ill. Rev. Stat. 1987, ch. 38, par. 9-1). Following a jury trial, defendant was found guilty of second degree murder (Ill. Rev. Stat. 1987, ch. 38, par. 9-2). Defendant was sentenced to serve a term of six years' imprisonment in the Illinois Department of Corrections with a credit for time served. Defendant appeals, raising the following issues: (1) whether the jury was properly instructed on the presumption of innocence and burden of proof; (2) whether the defendant was proved guilty of second degree murder beyond a reasonable doubt; (3) whether the trial court erred in admitting evidence of uncharged crimes allegedly committed by the defendant against his family; (4) whether the trial court erred in failing to instruct the jury that it could consider evidence of the victim's violent and aggressive

behavior; and (5) whether defendant's conviction was the result of his failure to receive competent and effective assistance of counsel. We affirm. A summary of the evidence at trial is set forth below.

For the State.

Brenda Cash testified that at approximately 12:10 p.m. on November 21, 1988, she arrived at Pratt Wayne Woods to meet a friend, Gary Smythe, for lunch. Smythe was already there, so she joined him in his car, a silver Thunderbird. She also noticed a brown or tan hatchback in the parking lot. The couple had talked for five or six minutes when the witness noticed that a blue car had pulled into the parking lot directly behind the tan hatchback. A man, later identified as the defendant, exited the blue car, with a gun in his hand, and stood in front of the driver's door. A woman, later identified as the defendant's wife, Janice Bosek, exited the passenger side of the tan hatchback and moved to the rear of the car. A man, later identified as the victim, Lucien Gilbert, exited the driver's side of the hatchback and also moved to the back of the hatchback. According to witness, Gilbert was dressed in a brown uniform.

The witness testified that the three individuals were standing one to two feet apart, the victim and Janice looking at the defendant. They were all angry and were arguing; defendant pointed a gun at the victim who had nothing in his hands. The witness turned back to look at Gary, at his request, when she heard a pop sound, like a firecracker. She turned back to look and saw Janice grabbing the defendant's arm screaming for help. She then saw the defendant point the gun down. She could not see the victim at that time. She then heard two more pops. She estimated that 30 seconds elapsed between the first pop and

the second two. Janice began to run towards the Smythe car yelling for help, at which point Gary began to back up his car so they could leave. As they left the parking lot, the witness observed the defendant running after Janice and also saw the victim face up on the ground, arms away from his body. She observed no weapon on the ground.

The witness testified further that, as Gary and she were reporting the shooting at the ranger's station, the blue car drove by. The witness told the ranger that the man driving the blue car had been involved in the shooting, and the ranger left to follow the blue car. Gary and she returned to the parking lot where she observed Janice holding the victim's head and crying. The witness observed a rifle at the end of the victim's feet, perpendicular to the body.

On cross-examination, the witness denied seeing the victim lift the hatchback up and stated that she did not notice if it was up. She also admitted that she did not tell Gary that the defendant had a gun in his hand.

Gary Smythe testified that he arrived at the Pratt Wayne Woods at approximately 12:05 p.m. on November 21, 1988. A tan hatchback car was also in the parking lot. A man and a woman were seated very close together in the driver's seat. Smythe parked his car between 50 and 75 feet away from the tan hatchback. Smythe was joined by a friend, Brenda Cash, who sat in the passenger side of his car. A little while later, he heard a pop sound and noticed that the geese and ducks were flying away. He also observed that the time was 12:19 p.m. on his clock radio. Approximately 30 seconds later, he heard two more pop sounds and a woman screaming. He looked over his left shoulder and saw the victim lying on the ground. He

also saw defendant standing about even with the head of the man lying face up on the ground. Defendant's right arm was pointed straight down, and his left arm was beckoning to Janice, who was about 20 feet from him walking back and forth. The witness saw no movement from the man on the ground. He also noticed a blue Lincoln automobile in the parking lot about 10 feet from the hatchback. Brenda and he reported the shooting as Brenda had testified, and then they returned to the parking lot. Brenda got in her car and left.

According to the witness, he went over to the hatchback and observed the victim, who had a rifle lying across his ankles, perpendicular to his feet. His feet were at the bumper of the car and his head away from the car. He did not observe the victim's arms because Janice was covering his body with hers.

On cross-examination, Smythe testified that he did not witness the shooting. Smythe also testified that the hatch of the hatchback was up. On redirect examination, Smythe testified that the blue Lincoln was about 10 to 15 feet back from the hatchback.

Kristian Johnson testified that on November 21, 1988, he arrived at Pratt Wayne Woods at approximately 12:20 p.m. As he pulled into the parking lot, he observed several vehicles, including a tan colored Chevette hatchback and a silver Thunderbird. As he started to eat his lunch, he heard a cracking sound and noticed that all the geese flew into the air. He then looked to his left and saw the victim lying on his back and the defendant standing next to the victim, with a gun in his hand. The victim's feet were toward the rear of the Chevette, and his arms were at his side. He did not see a weapon either in the victim's hands or on the ground. The witness heard Janice,

who was standing next to the Chevette, say, "I will go," or "I was going to go with you." The witness also observed a Lincoln continental parked at an angle 10 to 15 feet behind the Chevette.

The witness testified further that after he heard the cracking sound, he started his car to leave the parking lot. As he was leaving the parking lot, he observed the defendant, who was standing a couple of feet away from the head of the victim, lower his arms, and he heard three or four more shots. He did not see any movement from the victim. Approximately 15 to 30 seconds elapsed from the time he heard the first cracking sound to the second set of shots. The witness then drove to the ranger station and reported the shooting. Two people in a silver Thunderbird arrived and made the same report. At that point, the blue Lincoln drove by, and the witness identified the driver for the ranger who then pursued the Lincoln.

According to the witness, he then returned to the parking lot where he observed Janice lying on the victim's body. He also observed a rifle lying across the victim's ankles, perpendicular to his body. The barrel of the rifle was pointing toward the victim's right side. The witness had not previously seen the rifle.

On cross-examination, Johnson admitted making a statement to the police that he could not be sure he saw a gun in defendant's hands but that common sense told him that something had made the gunshot wounds. However, he testified that he did see a weapon in the defendant's hand.

Leo Eugene Vessling, a fire fighter-paramedic for the St. Charles fire department, testified that at approximately 12:29 p.m. on November 21, 1988, he and three other fire fighters-paramedics were dispatched to the Pratt

Wayne Forest Preserve in Wayne. When he first observed the victim, the victim's feet were near the rear of the car, and he was face up. There was a large gun lying across the victim's right leg with the gun butt to his right and the barrel to the left, approximately midway between the knee and the ankle. The witness observed two wounds to the chest. Cardiopulmonary resuscitation (CPR) was begun on the victim, as well as other emergency procedures, and the victim was transported to Delnor Hospital in St. Charles.

On cross-examination, Vessling testified that the victim was dressed in a tan uniform. He did note that the hatch on the car was up but did not look inside the car. In a report he gave, he stated that the victim's arms were to his sides, but he was not sure where his hands were.

Michael Panacchia, a Du Page County sheriff deputy, testified that on November 21, 1988, he took photographs of the victim at Delnor Hospital. He identified the victim's clothing, which consisted in part of a uniform, combat boots, and a holster.

James Slowinski, a Du Page County sheriff's deputy, testified that at approximately 12:30 p.m. on November 21, 1988, he was dispatched to Pratt Wayne Woods to investigate a shooting. Upon arriving on the scene, he observed the victim lying on his back; he appeared to have two bullet wounds in the chest near the heart area. Near the victim's feet was a small compact vehicle with the hatchback open. Inside the hatchback, the witness observed a semiautomatic rifle and a revolver. Deputy Slowinski then located Officer Read of the Wayne police department who told him that the person (the defendant) who had shot the victim was in Read's squad car. Slowinski asked the defendant to step out of the squad car,

which he did. Slowinski frisked the defendant and asked him if the shooting was an accident. The defendant responded no and mumbled something else which the witness did not hear because his attention was directed elsewhere. Defendant was then placed in the backseat of Slowinski's squad car. Defendant was not handcuffed. According to the witness, defendant was in his custody, but he did not know if the defendant was under arrest.

According to the witness, defendant told him where the gun he used was located in his car. He noticed that the latch to the compartment where the gun was kept was stiff. Slowinski returned to the defendant, obtained his name, and gave him his *Miranda* warnings. Later when defendant was questioned at the sheriff's office, defendant stated that the victim had been threatening the defendant's son and that if he (the defendant) had waited a couple of seconds longer he would have been the one lying on the ground.

On cross-examination, Slowinski testified that Officer Read was also present when the defendant denied that the shooting was an accident.

Thomas Read, police officer for the Village of Wayne, testified that, at approximately 12:30 p.m., he met the defendant at the corner of Railroad Street and Army Trail Road at which time the defendant told him that he had just shot a man in the forest preserve and indicated that he might still be alive. Officer Read described the defendant's demeanor as calm. Officer Read requested that defendant follow him back to the forest preserve. Upon arrival at the scene, Officer Read reported that he had a possible shooting and requested an ambulance. He placed the defendant in the backseat of his squad car. The victim was lying on the ground with his feet near the rear

bumper of his car. The victim had no pulse and was not moving. Officer Read observed a revolver in the open portion of the hatchback. He also observed a rifle lying across the victim just above the ankles, with the barrel across the victim's right leg. The victim's arms were out to the side with his elbows bent so that the upper arms were straight up.

According to the witness, defendant requested that he take pictures of the weapons. Once the paramedics arrived, he picked up the rifle and placed it in the rear of the open hatchback. A Du Page County sheriff's deputy arrived, and defendant was transferred into his squad car. Officer Read recalled that at one point the defendant mentioned a letter that he had found, but the officer could not remember the rest of what defendant said. He believed defendant was in his squad car when he made the statement. He was not in handcuffs, nor did Read ever tell the defendant that he was under arrest. The remark was not made in response to any question asked by Read.

On cross-examination, Officer Read testified that on September 19, 1988, he spoke with the defendant who informed him that his wife was having an affair with Lucien Gilbert (the victim) and that he was afraid that, if Gilbert were at defendant's home that night, there might be trouble. According to the defendant, Gilbert had stated that they would "talk it out or shoot it out."

Al Gorski, police officer for the Du Page County forest preserve district, testified that at approximately 12:30 p.m. on November 21, 1988, he responded to a report of a shooting at the Pratt Wayne Woods Forest Preserve. When Gorski arrived on the scene, he spoke with George Malekovic, a Du Page County forest ranger, who pointed at the defendant as the individual who had done the shoot-

ing. Gorski observed the victim lying on the ground being worked on by the paramedics. As Gorski prepared to get a summary of what had happened for his report, he walked by the squad car where Malekovic was standing with the defendant. According to Gorski, Malekovic asked the defendant if it had been an accident. The defendant responded no, that he had come there with the intention of doing something like that. Gorski was no more than five feet from the squad car when he heard the exchange and wrote it down word-for-word. Defendant had not been physically restrained and did not appear to be in any emotional state.

Richard Vaughn testified that he is a detective-sergeant with the Du Page County sheriff's department assigned to the crime laboratory as a forensic scientist and that his specialty is the field of firearms and tool-mark identification. The parties stipulated that Vaughn be qualified as an expert in that field. Vaughn testified that defendant's .38 revolver had four fired rounds and one live round still in the chamber. The victim's .357 magnum had five live cartridges in it and one empty chamber. The victim's rifle was an AKS 47 Russian assault-type weapon. It is a semiautomatic weapon which could be fired as quickly as someone could pull the trigger. The "banana" clip that was found with the rifle will accommodate 30 cartridges and that there were 29 cartridges in the clip. There were no cartridges in the chamber, and the safety was on. In order to discharge the rifle, the user would have to put the safety to a fire mode by moving the lever up, and then he would have to pull the bolt back and allow it to go forward and chamber any cartridge into the chamber.

On cross-examination, Vaughn testified that a person standing a few feet away from an AKS 47 would have

no way of knowing if the gun was in a firing mode or not. It would also be impossible to tell at a distance of 8 to 10 feet that the AKS 47 was fully automatic or semi-automatic. According to Vaughn, if the AKS 47 was fully automatic, it would be fair to say that 30 rounds could be discharged in 2.7 seconds.

Vaughn also testified that the hydrostatic shock (killing power) released by the bullets causes damage to the organs not touched by the bullets themselves. The .38 would cause the least amount of hydrostatic shock and the AKS 47 the most amount of the three weapons he tested.

Dr. Paul Meyer, a board certified orthopedic surgeon, was qualified as an expert in spinal trauma with particular expertise in the area of gunshot wounds to the spine. He testified that the bullet fired into the victim's back (the first shot) cut the victim's spinal cord at the T-4 level, entered the left lung and fractured the left clavicle. As a result of such injury, the victim would lose all muscle function and sensory function from the level of the spinal cord injury which would be at the level of the nipples all the way down to the tip of the toes. In other words, the victim would be rendered a paraplegic. Also, as a result of this injury, a large portion of the victim's sympathetic nervous system would also be lost, *i.e.*, the body would not be able to respond to a major injury. Given the position of the rifle between the knee and the ankle of the victim, Dr. Meyer was of the opinion that the victim would not have been able to lift his body off the ground to reach the weapon. According to the doctor, the probability of survival with this type of wound is as high as 95%.

On cross-examination, Dr. Meyer testified that the victim would have been able to move his right arm. He fur-

ther stated that an observer would not have any idea of the nature and extent of the injury just by looking at the victim lying on the ground.

On re-direct examination, Dr. Meyer testified that if after sustaining the wound to his back, the victim had had the weapon on his right hand and his hand on the finger housing, he would have been able to aim, albeit grossly, and fire the rifle. However, the victim would not have been able to sit up, flex any muscles below the nipple level and would have difficulty breathing.

Dr. Larry William Blum, board certified in forensic pathology, was qualified as an expert in that area. Dr. Blum testified that he performed an autopsy on the victim on November 21, 1988. In the course of the autopsy, he observed one gunshot wound to the back and two gunshot wounds to the left side of the chest. All three were entrance wounds; there were no exit wounds on the victim's body. Given the lack of "singeing" or actual stippling of gunpowder on the wounds or the victim's clothing, the shots were fired more than two feet away from the victim. The second two gunshots passed through the victim's heart and were consistent with the victim lying on his back when he received the second two shots. Dr. Blum also testified that the victim's blood-alcohol level was .22. In Dr. Blum's opinion, the victim died of hemorrhagic shock due to gunshot wounds in the chest. The gunshot wound to the victim's back contributed to his death, although it was not the type of wound that is invariably fatal. Although persons have survived gunshot wounds to the heart, the probability of survival from such would be virtually none.

Judy Zdrubecky, Janice Bosek's sister, testified that around the end of February or beginning of March 1988,

Janice and Lucien Gilbert had a relationship. During the summer of 1988, she became aware that they were seriously contemplating marriage.

The witness testified about a birthday party for Janice that was given by Gilbert, which the witness attended together with her mother and several friends. The morning after the party, Judy went to Janice and the defendant's home in Wayne. She observed that the flowers which Janice had received at the party the night before had been smashed and were scattered all over the driveway. She then testified that the defendant, Janice and she had a conversation in which Janice stated she wanted a divorce, and the defendant refused to give her one. According to the witness, defendant further stated that he was not going to let Gilbert take his wife, his kids, his money or his house. The telephone rang, and defendant proceeded to have a heated conversation with the caller, who was Gilbert. After he hung up, the defendant stated that he was going to kill that "son-of-a-bitch."

The witness testified further that she knew Gilbert socially and that he came to her house a couple of times a month, usually with Janice. Judy was not nervous or anxious about having him in her house.

On cross-examination, Judy testified that she had seen Gilbert with a holster on, but it was empty. Gilbert did show her husband a gun he owned. During the telephone conversation between Gilbert and the defendant, she was under the impression that Gilbert was coming over to the defendant's house to settle the matter with the defendant, Janice and himself.

On re-direct examination, Judy testified that Gilbert never acted in a particularly aggressive or violent nature, but was a very kind and polite person. Gilbert's relation-

ship with Janice was a very positive one. On re-cross-examination, Judy did not remember Gilbert threatening the life of her brother, Phil Rysinka.

Janice Bosek, wife of the defendant, testified that she has been married to the defendant for 26 years and they have five children ranging from 24 to 11. At the present time, she lives in Wayne. Previously the family had lived in Downers Grove for 19 years. She was introduced to Lucien Gilbert by her oldest son, Michael, in January 1988. After the initial meeting, she saw Gilbert on other occasions both with and without her husband. Their friendship expanded, and Gilbert started writing her letters and telephoning her when her husband was not home. At that time, defendant and Janice had purchased a new home in Wayne. Defendant was staying at the home in Wayne with Janice residing in Downers Grove with the children. By June 1988, the relationship had become a sexual one, and Gilbert and she began to discuss marriage, which would have taken place in September 1989. According to Janice, Gilbert had contacted two divorce lawyers and placed funds in both their names. However, the day they planned to see a lawyer about her divorce, defendant stayed home from work, and she was unable to keep the appointment.

Janice further testified that certain of her family members were aware of her relationship with Gilbert before the defendant was. In October 1988, she informed defendant that Gilbert wanted to marry her. After receiving this information, defendant disabled her car (the blue Lincoln continental) and fixed the telephone in the house so that she could not make telephone calls. He also began coming home during the day at different times, supposedly to have lunch with her. She continued to receive letters, about 12 a week, from Gilbert and would call him when

she could get to a telephone. Until the last two weeks before his death, Gilbert would give her the letters, she would read them and return them to him. During the last two weeks before he died, Gilbert mailed his letters to her because there was no way else to get them to her. They did not see each other during the last two weeks prior to Gilbert's death. Gilbert never threatened the defendant in her presence, but he did say that if the defendant ever came after him, he would shoot him in the legs in self-defense.

Janice testified further that on the morning of November 21, 1988, she borrowed her daughter's car to go to a public telephone to call Gilbert because the Lincoln did not run, and the telephone was not working. Gilbert wanted her to report the matter to the police; they argued, and she hung up on him and returned home. At approximately 10:30 a.m., Gilbert arrived at her house. He was carrying a gun in the holster he was wearing, and she asked him to remove the gun. That was the only time she had seen him with a handgun on his person. He ordinarily kept it in a blue box. The previous August, the defendant and Gilbert had compared handguns. She went upstairs to finish dressing, and, when she returned, she saw a rifle lying on her kitchen table, and she told Gilbert to put it away.

Janice then testified that Gilbert and she left the house in his car (the tan Chevette hatchback). He took her to the Wayne police station. They waited in the police station, but there was no one available right away to take a report. She was so nervous that she ran out of the police station. She suggested that they wait at Pratt Wayne Woods and then return to the police station. They arrived at the forest preserve at approximately 11:30 a.m. They just sat in the car talking and kissing.

Janice further testified that at approximately 12:20 p.m. she noticed that her blue Lincoln was approaching and stated, "There's Norm." The Lincoln was parked about 10 feet from the Chevette. Gilbert got out of the car. She heard defendant and Gilbert talking and then she got out of the car and ran to the back of the Chevette. She observed the doors of the Lincoln were open and the defendant standing where the backseat of the Lincoln was. Defendant's hand, which held a gun, was at his side. The hatchback of the Chevette was up and Gilbert was leaning into it. When she saw the gun in defendant's hand, she yelled that she would go home. Defendant then raised the gun and pointed it at her for five seconds and then pointed it at Gilbert. She told the defendant not to shoot. Defendant then shot Gilbert in the back. Gilbert fell to his knees and ended up on his back with his arms up. Defendant was about three feet from Gilbert's head as he lay on the ground. She said to the defendant, "You didn't shoot him, did you?" Defendant did not answer, but Gilbert shook his head indicating he was shot. There was no other movement from Gilbert's body.

Janice further testified that she began running to a car for help. She then hesitated and ran back to where the defendant was standing and stood behind and to the right of the defendant. Defendant was standing between the Lincoln and the Chevette, closer to the Chevette. Defendant raised his gun at which point she said, "Don't give him more," and tried to grab his arms. Defendant then fired two more shots. About 30 seconds had elapsed between the first shot and the second two. She then ran up to a car, but the driver backed the car away and out of the parking lot. She returned to where the victim lay and removed the cigarette out of his mouth and moved his arm closer to his body. There was a rifle lying across

the victim's legs, just below his knees. She tried to get it off his leg but only moved it an inch or two. At this point, defendant asked her to go to the Wayne police station with him, but she refused.

Janice also testified that defendant had purchased his gun 10 to 15 years before for their boat. In June 1988, she had found the gun loaded, in defendant's dresser. Because of the children, she had Gilbert tell her how to disarm it, and she hid the gun and the bullets. A week later, she returned it to the defendant without the bullets which she kept hidden. She also stated that the latch on the compartment on the door of the Lincoln was hard to open.

On cross-examination, Janice testified that when she first met Gilbert, she thought he was divorced but, in fact, his divorce did not become final until February 1988. She stated that Gilbert was three years younger than she and looked young for his age. She described him as very kind, nice, with good manners. Both her mother and sister, Judy, liked him. Judy would act as a "cover" for Gilbert and her. She admitted that Gilbert had sent her a list of 49 women with whom he had had a sexual relationship.

Janice testified that Gilbert was not employed much during the time she knew him and that he drank beer all the time, including the morning. She saw him smoke marijuana twice. On November 21, 1988, Gilbert had beer in a Tupperware container. She also stated that Gilbert liked to wear a bandanna around his head, a trait he had picked up in Vietnam. She denied that Gilbert wore army fatigues or army boots.

Janice testified as to an extensive correspondence with Gilbert. She related some of the phrases Gilbert would use in letters from him to her such as "shoot out at the O.K. Corral," and "I have had to kill people for real."

In a letter to her son, Michael, Gilbert stated, "I'll will give him a war that he won't believe even when it's happening." She stated that Gilbert did not like to be called "Rambo" but that it was her pet name for him. They would also call each other "Jason" and "Marie" or "Clyde" and "Miss Bonnie Parker" after movie characters.

Janice identified a letter dated March 8, 1988, wherein she stated that she loved Gilbert. She testified that it was in May 1988 that a sexual relationship developed between Gilbert and her, and the letters they wrote each other afterwards contained explicit references to their sexual relationship. She also identified letters which indicated that a divorce was discussed in July 1988, as well as a letter from Gilbert in which he expressed anger that she was reluctant to leave her husband. When she stated that she wanted Gilbert to "Fix it," she meant that Gilbert should go to bed with her, not to eliminate the defendant.

Janice further testified that defendant wanted to save their marriage. The weekend of September 16, 1988, after she had told him that she wanted to marry Gilbert, was spent discussing their marriage. She identified a letter she wrote to Gilbert after that weekend in which she questioned whether she had the right to destroy her family for her own needs and wanted time to think. She also identified two letters from Gilbert which indicated that he loved her and he would leave if she wanted him to.

Janice then testified that on September 19, 1988, defendant may have told her that Gilbert had called him at his office and threatened him, but she did not remember what she said to the defendant at that time. She would sometime get letters from Gilbert indicating that he was breaking up with her because of her indecisiveness, and then she would get a love letter from him. After her re-

quest for a divorce, the defendant started being especially nice to her, trying to buy her back, but she felt it was too late. After one call from Gilbert to the defendant, defendant told her he was going to the police to report he was being threatened by Gilbert. She called Gilbert and told him not to come over.

Janice also testified that in October 1988 Gilbert had a birthday party for her, attended by her mother, her sister, Judy, and some friends. Gilbert gave her flowers which she brought home. After finding out where she had been, defendant threw the flowers, gifts, etc., all over the driveway of their house. It was after that incident that defendant cut off her transportation and communication. Defendant had previously used these methods to keep her restricted.

Janice identified a letter in which Gilbert described an incident in which a school bus driver had cut him off and said if he found the guy, he was going to beat him up because he had nearly killed the children on the bus and claim self-defense. She also identified another letter written in November 1988 in which he threatened her brother, Phil Rysinka, for "bad mouthing" Judy and Janice. She also identified a letter from Gilbert to her son, Michael, in which Gilbert asked Michael to cooperate in obtaining some medical records for several years before. She was aware that Michael did not want to obtain the records. She was also aware that Gilbert wrote another letter to Michael after he refused to get the medical records. In that letter, November 16, 1988, Gilbert stated that he had killed people for real and would not be intimidated by Michael who did not know what it meant to cut a man's throat or blow a man's head off.

Janice testified further that on November 19, 1988, defendant and she attended a party at Len and Gail Clark's.

Defendant was being very attentive to her, and she called people's attention to that fact. She knew that Gilbert had reported to the Wayne police that she was being physically abused. Defendant had struck her once since she had met Gilbert. During the course of their marriage, defendant had dominated her, while Gilbert left her with the impression they would have an equal partnership.

Janice testified that she did not tell anyone that defendant pointed the gun at her because no one asked. She agreed that in none of the statements she gave after the incident was there any mention by her that defendant pointed a gun at her. She did not remember if the clip was in the rifle. She never mentioned to the police that she moved the victim's hands or the position of the rifle.

On re-direct examination, Janice testified that she had told Gilbert that the defendant was abusive to the children and had once beaten Michael to the point he missed school. Defendant had also hit their other children, as well as herself. After defendant smashed her flowers, he ripped the banister and threw it into the foyer, and when she tried to call the police, he threw the telephone at her. In October 1988, she warned Gilbert that if she filed for divorce, she would be signing his death warrant. She also stated that Gilbert had gotten angry with her brother, Phil, for calling Judy a slut.

According to Janice, Gilbert told her that Michael threatened to get 20 people after him. Gilbert also told her that defendant was going to shoot him but that he would not because he had too much to lose.

For the defense.

The defendant testified that he is a mechanical engineer and has been employed by Fermi National Accelerator Lab for 11½ years. He has been married to Janice for

26 years, and they have five children. Janice did not work outside of the home since the birth of their first child, Michael. The family resided in Downers Grove until they moved to Wayne in June 1988. The home in Wayne was purchased in December 1987. The defendant began moving things into the Wayne house during the early months of 1988, and he stayed at the house two nights a week. During their marriage, Janice and he had never separated for any prolonged period of time or sought a dissolution of their marriage.

Defendant testified that he met Lucien Gilbert in January 1988 when defendant's son, Michael, introduced them and saw him socially several times after that. In August 1988, Gilbert was in the backyard shooting a .357 revolver. Defendant told him that it was against the law to discharge the revolver and that he did not want him shooting it in his backyard. They then discussed guns, and defendant showed him the .38 revolver that he had. In the summer, Gilbert was usually dressed in combat boots, khaki tan pants, and a bandanna around his head. He also had a hunting knife and a gun in his belt.

Defendant testified further that in June 1988 there was friction between Janice and him and she began sleeping in a different room. On September 16, 1988, Janice told him that she wished to marry Gilbert. On September 19, 1988, defendant received a telephone call at work from Gilbert who informed him that he was in love with Janice, that the defendant and he would settle it with guns or knives and that they would have a "Shootout at the O.K. Corral." Gilbert then shouted profanities and said he was coming to get the defendant. Defendant hung up the telephone and called the Wayne police department where he reported the incident to Officer Read. He informed Janice that he had received a threatening call from Gilbert. He

then put five bullets in his .38 revolver. He had never discharged the revolver prior to November 21, 1988. Defendant then attempted to win Janice back by being nice to her, buying her gifts and taking her out to dinner.

Defendant testified that approximately 2½ weeks after the September 19, 1988, telephone call, he received another call from Gilbert at home. Gilbert again threatened him and stated that he was coming out to get the defendant right away. Defendant then attempted to contact the police. Janice informed him that she had called Gilbert, and he was not coming over. Defendant put his gun in his pocket and walked around for about an hour. About three weeks later he received another threatening call from Gilbert at home. After that, when Gilbert called, defendant hung up on him. Gilbert called 20 times. Defendant denied threatening Gilbert either verbally or in writing.

Defendant further testified that on Janice's birthday, which was October 22, 1988, Janice did not return home until 10:45 p.m. She had a box of roses which she told defendant came from Gilbert. Defendant became upset and threw the roses on the ground. They continued to argue, but defendant denied throwing the telephone at Janice. He admitted pushing on the banister, and it broke. After that incident, he disabled the telephone and her car because he did not want her to communicate with or see Gilbert. He also started coming home for lunch.

Defendant further testified that early in November, his son, Michael, showed him a letter he had received from Gilbert. The letter asked Michael to obtain Michael's medical records from seven years previous and then give them either to Janice or Gilbert. Defendant left it up to Michael to decide what to do. A few days later, Michael told the

defendant that he had a telephone communication with Gilbert about the medical records. On November 19, 1988, defendant was attending a party at the Clark's and received a telephone call from Michael. According to Michael, he had received another letter about the medical records. On November 20, 1988, Michael showed defendant and Janice the letter he had received from Gilbert. Janice accused Michael of threatening Gilbert. Defendant told Michael they should put the matter in the hands of an attorney.

Defendant further testified that on November 21, 1988, he returned home from work at approximately 11:30 with some beef sandwiches he purchased for lunch with Janice. Janice was not at home so defendant went out to look for her. He also stopped by the post office and picked up their mail which included a letter addressed to Janice, which he opened and read. It was a love letter from Gilbert to Janice. He returned to the house but decided he could not return to work without finding out where Janice was. Thinking that Gilbert might be at the house when he returned and that there might be a confrontation, he placed his .38 revolver in the left-door compartment of the Lincoln. He drove by a restaurant and then decided to check the Pratt Wayne Woods. Upon entering the first parking lot, he saw Gilbert and Janice in a tan Chevette. Gilbert made eye contact with him and got out of the car and walked slowly toward the back of the Chevette. Defendant pulled about 15 feet behind the Chevette and got out of his car. About five seconds later, Janice got out of the Chevette. Defendant then noticed that Gilbert had opened the hatchback of the Chevette and had pulled out a rifle with a clip on it. Gilbert's left hand was on the front stock of the weapon. Although Gilbert's back was to him and he was 10 to 15 feet away, defendant saw him

twist or turn a lever on the rifle. Defendant described the rifle as a machine gun. Defendant opened the compartment on the door and removed his gun. He took a step around the side of the car door, aimed, and shot at Gilbert as fast as he could.

Defendant further testified that after he shot at Gilbert, Gilbert fell back on his behind, the rifle resting on his knees, and then he fell over on his left elbow, with his arms to the sides of his body. Defendant then saw Janice run back and forth hysterically. He then saw Gilbert take his hand off the pavement, slide it down his right leg, and reach for the rifle. Defendant then aimed his gun at him and pulled the trigger until it would not fire any more. Defendant then ran around his car because there was no indication that Gilbert had been shot, except that he was lying on the ground. He then tried to convince Janice to go with him to get the police, but she refused to go. Defendant then left the scene and located Officer Read. He told Officer Read that he had just shot someone and to call an ambulance. He then led Officer Read back to the scene. When they returned to the scene, he asked Officer Read to take a picture of the rifle. They also noted the .357 magnum revolver in the open hatchback. Two squad cars arrived, and defendant was placed in a squad car. Officer Slowinski asked him if it was an accident, and defendant told him no. Defendant denied saying that he had come to the forest preserve with the intention of doing something like this. Defendant also denied pointing the gun at Janice.

On cross-examination, defendant testified that until September 1988 there was no animosity between Gilbert and himself. He was upset when Janice told him she wanted to marry Gilbert. Although Gilbert had threatened to come over to get the defendant, he had never carried out

those threats. Defendant had handled other guns before, such as pellet guns and shotguns. He disconnected the telephone and the car to keep Gilbert from brainwashing Janice. November 21, 1988, was the first time Janice was not home when he came home for lunch. He brought lunch home that day because he felt sorry for her. Although she felt she was a prisoner, he had only made it inconvenient for her to travel or talk on the telephone.

Defendant further testified that the medical records of Michael's which Gilbert and Janice were seeking had to do with a fight defendant had had with Michael seven years ago, as a result of which Michael had to seek medical attention. Michael missed two days of school and wore a patch over his eye for two days.

Defendant further testified that he never stated to Janice and Judy that he was going to kill Gilbert. On November 21, 1988, he thought there was a 50-50 chance Janice was with Gilbert. He had driven his truck to work that day and had to fix the Lincoln in order to drive it. He entered the front parking lot of the forest preserve to turn around. He had no idea that Gilbert and Janice would be in the forest preserve. When he opened the car door, he shouted to Janice to come to the car, that he was taking her home. He never heard Janice say that she would go home with him. He clearly saw the barrel of the rifle and the clips. He saw Gilbert turning a lever and then he shot him. He did not kick the rifle out of Gilbert's hands because he was too far away. Gilbert moved his hand off the pavement and got within four inches of the trigger before the defendant shot him again.

Defendant further testified that there was a lot of people around when Officer Slowinski asked him if it was an accident. Defendant denied making any other statements other than, "No."

Karen Verna Birks, the former wife of Lucien Gilbert, testified that she was married to Gilbert from 1975 to 1988. During their marriage, Gilbert was unemployed 50% of the time. He drank alcohol quite a bit which led to problems with his employment. He had an antique gun collection, but, otherwise, she never permitted guns in the house. After they separated, Gilbert rented the house next door, and, on one occasion, she observed him wearing a holster with a gun in it. Twice she had to call the police when Gilbert came over uninvited, but no complaints were filed.

On cross-examination, Karen testified that during their marriage Gilbert never wore a holster around the house. She never saw him dressed in any fatigues. He had a bad temper when he was drinking. Gilbert was not aggressive, although he was a talker, and it was limited to talk. She never saw him in a fight nor threatening to kill anyone. The times Gilbert came over uninvited were to see their dog.

Thomas Lynch testified that until November 1988 he was employed by Jenkins Security. In June 1988, Gilbert was hired, and Lynch was his supervisor for part of the time. Lynch observed Gilbert drinking on the job and carrying a firearm which he was not permitted to do. He also set booby traps around the construction site which was not proper security procedure. Gilbert was eventually fired for his use of unauthorized firearms and reporting to duty with alcohol on his breath. Lynch also contacted the Naperville police department because of death threats Gilbert was making against people on the construction site.

On cross-examination, Lynch testified that the only reason that he did not like Gilbert was that he carried his

gun all the time. On re-direct examination, Lynch testified that Gilbert's nickname at Jenkins was "Rambo."

Gail Clark testified that defendant and Janice attended a party at her home on November 19, 1988. Prior to the party, a man who identified himself as Lucien Gilbert telephoned. He telephoned again one-half hour before the party began. She also testified that she had known defendant and Janice for 15 years and that they seemed to have a good relationship.

Michael Bosek, the 24-year-old son of the defendant and Janice, testified that he met Lucien Gilbert in November 1987 and introduced him to his family. In the spring of 1988, he noticed that Gilbert was present at his family's home quite a bit even when he was not present. After the family moved to Wayne, Michael got his own apartment. When he visited the home in Wayne, Gilbert would be there with Janice. Gilbert would be dressed in camouflage or khaki green clothes and have a red bandanna on, and he wore a shoulder holster with a 12-inch Bowie knife.

Michael testified that in November 1988 he received a letter from Gilbert requesting his medical records, to which he did not reply. Gilbert called him at work and demanded the medical records. Because he was afraid, Michael gave Gilbert the impression he could have the records. He interrupted Janice's telephone conversation with Gilbert telling him that he knew what Gilbert was trying to pull and that there was going to be 20 people really upset by it. Michael denied telling Gilbert that 20 people were going to come after him physically. He discussed the letter with his father and told him he was afraid. Shortly after the telephone conversation, he received another letter from Gilbert. He was so upset by the letter he called his father at the Clark's party and

told him that he was afraid that Gilbert would come after him. The letter had stated that Gilbert was going to send him a hand grenade. After he showed the letter to his parents, the defendant was going to set up an appointment with an attorney. Michael denied making any threats against Gilbert.

On cross-examination, Michael testified that he was unhappy about the thought of a divorce between his parents.

Following closing arguments, the jury deliberated and returned a verdict, finding the defendant guilty of second degree murder. Defendant was sentenced as indicated above, and this appeal followed.

Defendant contends, first, that he was deprived of his rights to due process when the trial court failed to instruct the jury as to the presumption of innocence and the State's burden of proof beyond a reasonable doubt on second degree murder.

Defendant concedes that he failed to object to the omission he now complains of at the time the jury instructions were tendered, nor did he offer any instructions to remedy the alleged deficiencies. It is well established that the failure to object at trial to an asserted error in jury instruction waives the question, and no party may raise on appeal the failure to give an instruction unless he tendered it at trial. (*People v. Huckstead* (1982), 91 Ill. 2d 536, 543.) Defendant argues that he, in fact, has preserved the error by raising it in his post-trial motion. However, subject to certain exceptions not applicable here, to be preserved, error must be objected to at trial and be raised in a post-trial motion. (See *People v. Enoch* (1988), 122 Ill. 2d 176.) One of the exceptions to the waiver rule in *Enoch* is if plain error has occurred. Inasmuch as we conclude the jury was properly instructed, no such error occurred.

In Illinois, a person commits second degree murder when he commits the offense of first degree murder and either of two mitigating statutory factors is present. The statutory factor applicable in this cause is that, at the time of the killing, the defendant believed the circumstances to be such that, if they existed, they would justify or exonerate the killing but his belief was unreasonable. The statute goes on to provide as follows:

> "(c) When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code [self-defense]. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder." Ill. Rev. Stat. 1987, ch. 38, par. 9-2.

In *People v. Shumpert* (1989), 126 Ill. 2d 344, our supreme court explained the second degree murder statute as follows:

> "Under the old homicide statute, the State had the burden to prove, beyond a reasonable doubt, the ele-

> ments of murder. [Citation.] The defendant then had the opportunity to present evidence of a factor in mitigation, serious provocation or unreasonable belief, either of which must have been present to reduce an offense of murder to voluntary manslaughter. [Citation.] The State then had the burden to prove, beyond a reasonable doubt, the absence of the factor in mitigation. [Citation.] Under the new Act, the State still bears the burden to prove, beyond a reasonable doubt, the elements of first degree murder. [Citation.] However, the defendant now bears the burden to prove, by a preponderance of the evidence, one of the factors in mitigation which must be present to reduce an offense of first degree murder to second degree murder. [Citation.] Thus, the new Act not only requires the defendant to come forward with *some* evidence of a factor in mitigation; it requires the defendant to prove, *by a preponderance of the evidence*, a factor in mitigation. Furthermore, the State is no longer required to prove, beyond a reasonable doubt, the absence of the factor in mitigation. (Emphasis in original.) *Shumpert*, 126 Ill. 2d at 351-52.

It is not disputed that the jury in this cause was properly instructed as to the presumption of innocence and the burden of proof beyond a reasonable doubt as to the offense of first degree murder. There is no requirement that the jury be further instructed as to the presumption of innocence and burden of proof as to the offense of second degree murder because in order for the jury to reach the issue of whether the defendant is guilty of second degree murder, it must already have found him guilty of first degree murder beyond a reasonable doubt.

Finally, we note that section 9-2(c) states the burden of proof remains on the State to prove the absence of circumstances which would "justify or exonerate the killing under the principles stated in Article 7 of this Code. [jus-

tifiable use of force]." (Ill. Rev. Stat. 1987, ch. 38, par. 9-2(c).) In this case, the defendant claimed self-defense. The jury was instructed in this cause that one of the elements the State must prove beyond a reasonable doubt is that the defendant was not justified in using the force which he used. We agree with the State's argument that an unreasonable belief in self-defense, as defined in section 9-2(a)(2), is not the same as a reasonable belief in self-defense and is not an element the State must disprove. Defendant's reliance on *People v. Reddick* (1988), 123 Ill. 2d 184, and *People v. Brooks* (1988), 175 Ill. App. 3d 136 is misplaced for in those cases the courts discuss the State's burden under the prior voluntary manslaughter statute.

We conclude that, inasmuch as the jury was properly instructed, plain error did not occur, and the jury instruction issue is therefore waived.

Next, the defendant contends that the evidence at trial proved beyond a reasonable doubt that he acted in self-defense when he killed Lucien Gilbert.

A person is justified in the use of deadly force when that person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." (Ill. Rev. Stat. 1987, ch. 38, par. 7-1.) Whether a person has acted in self-defense depends upon the surrounding facts and circumstances and is a question for the trier of fact to determine. (*In re S.M.* (1981), 93 Ill. App. 3d 105, 109.) However, the court must carefully review the evidence and has the duty to reverse a conviction where the record leaves us with a grave and substantial doubt as to the guilt of the defendant. (*In re S.M.*, 93 Ill. App. 3d at 109.) Under the prior statute, when the jury concluded that the defendant subjectively believed that the use of deadly force was necessary but that his

subjective belief was unreasonable, then the proper verdict was voluntary manslaughter. (93 Ill. App. 3d at 109.) The jury in the present cause found the defendant guilty of second degree murder which is similar to the offense of voluntary manslaughter. Thus, we need only consider whether the defendant's belief was unreasonable. 93 Ill. App. 3d at 110.

We have set forth the evidence in this cause in great detail, particularly the testimony of the witnesses to the shooting of the victim by the defendant. The State's version of the shooting was that the defendant shot Lucien Gilbert as Gilbert stood facing the open hatchback of his car with his back to the defendant. After Gilbert fell to the ground, defendant fired two more shots into his body, which proved to be the cause of Gilbert's death. The State's witnesses did not see a rifle until after the shooting, nor did they see Gilbert move after the first shot. The defendant's version was that Gilbert had reached into the hatchback to take out a rifle which he then appeared to load. Defendant shot first, believing, given Gilbert's past threats to him, that he was about to be killed by Gilbert. After the defendant shot Gilbert and he had fallen to the ground, defendant then fired at him again because he saw Gilbert's hand move toward the trigger of the rifle.

The defendant's version is consistent with his theory of self-defense. The State's version, if believed, established that Gilbert was not going to fire his rifle at the defendant or even if he intended to, after the first shot, he was either unable or did not, in fact, reach for the rifle as he lay on the ground.

The jury in this cause chose to believe that while the defendant believed he needed to shoot Gilbert in self-defense, defendant's belief was unreasonable and that de-

fendant was, thus, guilty of second degree murder. We are of the opinion that there is no basis for disturbing the jury's rejection of the defendant's theory of self-defense.

Next, the defendant contends that the trial court erred in rejecting his requested instruction relating to evidence of Lucien Gilbert's aggressive nature. The tendered instruction read as follows:

> "Evidence of the victim's aggressive and violent character may be considered by you along with the other facts and circumstances to show who was the aggressor."

The trial court refused the instruction on the grounds that it singled out one aspect of the case, it was a non-IPI instruction and that the point was adequately covered by other IPI instructions.

In *People v. Sequoia Books, Inc.* (1987), 160 Ill. App. 3d 315, this court upheld a trial court's refusal to give a non-IPI instruction and one which we felt singled out and unduly underscored the importance of one particular piece of evidence. (*Sequoia Books, Inc.*, 160 Ill. App. 3d at 322-23.) Moreover, a non-IPI instruction should be used only if a pattern instruction does not contain an accurate instruction on the subject upon which the jury should be instructed. (160 Ill. App. 3d at 322.) The jury in this cause was instructed as to the justifiable use of force by the defendant and that they had to find beyond a reasonable doubt that he was not justified in using the force he used in order for him to be found guilty of first degree murder. The fact that the ample evidence of the victim's aggressiveness and threatening nature was considered by the jury is reflected in the fact that defendant was found guilty of second degree murder rather than first degree murder, *i.e.*, defendant could believe that force was necessary

given the victim's aggressive nature, but under the circumstances, the belief was unreasonable.

Defendant's reliance on *People v. Lynch* (1984), 104 Ill. 2d 194 is misplaced, as *Lynch* is distinguishable from the case at bar. In *Lynch*, our supreme court held that when a theory of self-defense is raised, *evidence* (emphasis added) is relevant to show who is the aggressor. (*Lynch*, 104 Ill. 2d at 200.) *Lynch* does not discuss the giving of non-IPI instructions on the issue of a victim's aggressive nature and therefore is not authority for the giving of such an instruction. As previously stated, the defendant was permitted to introduce evidence of Gilbert's aggressive nature, as well as the threats he communicated to the defendant, unlike the situation in *Lynch*. The defendant cites no other authority which requires the giving of a non-IPI instruction on this point. Therefore, we conclude that the trial court did not err in rejecting defendant's tendered instruction.

Next, the defendant contends that the trial court erred in admitting evidence of uncharged crimes and alleged violent acts committed by the defendant. The complained of testimony consisted of statements that Michael had to receive medical attention as a result of the altercation with the defendant.

The general rule is that evidence of crimes not charged in the indictment is inadmissible. (*People v. Barbour* (1982), 106 Ill. App. 3d 993, 999.) However, our supreme court has held that evidence of other crimes committed by the defendant may be admitted if relevant to establish any material question other than the propensity of the defendant to commit a crime. (*People v. Stewart* (1984), 105 Ill. 2d 22, 62.) Evidence of other crimes is admissible if it is relevant to establish any fact material to the prosecution. *Stewart*, 105 Ill. 2d at 62.

Defendant relies on *People v. Bouska* (1983), 118 Ill. App. 3d 595. In that cause Bouska was convicted of the offense of aggravated battery of his girlfriend, Susan Forsberg. On appeal, Bouska contended that the trial court had erred in refusing to admit evidence of his continued relationship with her after the alleged beating had taken place. The reviewing court upheld the trial court's decision barring the evidence, holding that the evidence in question would shed no light on whether Bouska beat Mrs. Forsberg and that the admission of such evidence would draw the jury away from the important issue of whether Bouska was guilty of aggravated battery.

We note that it was the defendant who first raised the subject of the medical records in cross-examination of Janice. On re-direct examination by the State, Janice testified concerning Michael's need for medical attention as the result of an altercation with his father. Under questioning by his attorney, defendant testified as follows:

> "My son [Michael] had received a letter from Gilbert wanting him to go to a medical center that we had taken him to seven years previous when he and I had a fight and he wanted my son to obtain medical records and give them to [Janice]."

On cross-examination, defendant was questioned as to what medical records Janice and Gilbert were seeking to obtain from Michael. Defendant explained again that he and Michael had had a fight and Michael had had to seek medical attention afterwards.

When an accused has interjected an issue into a case, he cannot then argue it was error for the State to bring the issue to the jury's attention. (*People v. Ortiz* (1987), 155 Ill. App. 3d 786, 794.) The testimony elicited by the State was virtually identical to what the defendant testified to on direct examination. Therefore, we find no error

in the admission of the testimony concerning why Michael needed to seek medical attention.

The defendant also complains that in its closing argument the State characterized him as an individual who physically and emotionally abused his wife, Janice. Defendant maintains that there is no evidence that he physically abused Janice. However, Janice testified that defendant hit her and their children. She further testified that he had disabled her car and the telephone, facts which certainly could be argued as emotional abuse toward Janice by the defendant. Interestingly enough, defendant, though denying the existence of the testimony, argues that it should have been excluded by the court.

We note that none of the complained of testimony was objected to and, therefore, any objection to it is waived. (*People v. Romano* (1985), 139 Ill. App. 3d 999.) Moreover, the State's efforts to show that the defendant was less than the perfect family man corresponded to the defendant's efforts to point to the victim as a "macho Rambo-type aggressor" who was breaking up the defendant's "perfect home life." We conclude therefore that no error occurred in the admission of the complained of testimony.

Finally, defendant contends that he received ineffective assistance of counsel which resulted in his conviction.

In *People v. Albanese* (1984), 104 Ill. 2d 504, our supreme court adopted the standard for reviewing claims of attorney incompetence set forth in *Strickland v. Washington* (1984), 466 U.S. 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052. Under that standard, the defendant must prove that counsel's representation fell below an objective standard of reasonableness, that as a result he was deprived of a fair trial and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Al-*

banese, 104 Ill. 2d at 525.) A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant, and when it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice, that course should be followed. 104 Ill. 2d at 527.

Defendant argues that defense counsel failed to file a motion to suppress statements he made to Officer Slowinski. Slowinski asked the defendant whether the shooting was an accident, to which the defendant responded, "No." Later, defendant told Slowinski that his gun was in the compartment on the driver's door of his car. Defendant maintains that he was in custody and had not received his *Miranda* warnings at the time he made the statements.

Contrary to defendant's argument on appeal, the admission of his statement "No" did not destroy his theory of self-defense. Obviously if it was in self-defense, the shooting was not an accident. Defendant denied saying anything other than "No." Further, it is clear from the record that defendant "volunteered" the location of his gun and was not responding to a question posed by Slowinski.

Traditional investigatory functions of the police, including general on-the-scene questioning in the fact-finding process, where the compelling atmosphere inherent in the process of in-custody interrogations is not present are exempted from protection under *Miranda*. (*People v. Thompson* (1971), 48 Ill. 2d 41, 44.) Neither of the complained-of statements was protected under *Miranda* and, therefore, the defense counsel's decision not to bring a fruitless motion to suppress was not error.

Defendant then argues that defense counsel failed to object to highly prejudicial testimony concerning the defen-

dant's character, specifically the incident between the defendant and his son, Michael. Although we acknowledged counsel's failure to object to this evidence, we also found that that evidence was properly admitted as a response to defendant's presentation of himself as a "good family man" whose home was being broken up by "Rambo." Thus, even had proper objections been made, the testimony would have properly been admitted.

Next, defendant argues that defense counsel failed to object to hearsay testimony and only made approximately 25 objections, only five of which are substantive, during a seven-day jury trial. Defendant relies on *People v. Royse* (1983), 99 Ill. 2d 163. In that case, our supreme court reversed Royse's conviction when his defense counsel objected only three times in the course of a three-day trial, thus allowing the prosecution's witnesses repeatedly to give damaging hearsay testimony, to offer their opinions, to summarize conversations without adequate foundation, and to volunteer incriminating information about other drug transactions that were not involved in Royse's trial.

At one point in the instant case, the trial court noted that the defense counsel's strategy was not to object much and let in a lot of information. Defendant must overcome the presumption that the acts or omissions he complains of are sound trial strategy. (*Albanese* (104 Ill. 2d at 526, citing *Strickland v. Washington* (1984), 466 U.S. 688, 689-90, 80 L. Ed. 2d 674, 694-95, 104 S. Ct. 2052, 2065-66.) Defendant does not point out with any particularity which hearsay statements he is complaining of or how he was prejudiced by their admission. Moreover, it appears that defense counsel's strategy resulted in defendant's conviction of second degree murder as opposed to the more serious first degree murder. We are of the opinion that de-

fense counsel's failure to object was but trial strategy and successful trial strategy, rather than an omission, which led to defendant's conviction.

Next, defendant argues that defense counsel erred by failing to have two letters, one written by Janice and one written by Lucien Gilbert, admitted into evidence. Part of Janice's letter was, in fact, admitted, but when the State objected to portions of the letter, on the basis it contained sexual references that had no place in the trial, defense counsel indicated he had no great problem with not having those portions of the letter admitted. The trial court refused to admit Lucien Gilbert's letter, again due to the sexual nature of the letter, although the letter did go to show Gilbert's deteriorating mind. The trial court found it was probative of the issues at trial.

Defendant contends that, without these letters in evidence, the jury was left with the impression that Janice and Gilbert had a "pristine and beautiful *extra-marital* affair." (Emphasis in original.) As to Gilbert's letter, the record is clear that defense counsel offered it into evidence, it was objected to by the State and, after argument, the trial court refused it. The fact that the trial court ruled against the defense counsel is not error on counsel's part under these circumstances. Further, the refusal of the trial court to admit the "sexual" portions of Janice's letter was proper in that such a letter would divert the jury's attention improperly from the facts of the murder case to the sexual adventures of Janice and Gilbert. (See *People v. Bouska* (1983), 118 Ill. App. 3d 595.) Thus, no error occurred in the failure to admit the letter into evidence.

Finally the defendant contends that the cumulative effect of defense counsel's errors deprived him of his right

to effective counsel. Inasmuch as we have found that defense counsel was not ineffective, we conclude that defendant's final issue has no merit.

For all of the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

INGLIS and NICKELS, JJ., concur.

Order of the Supreme Court of Illinois Denying Leave to Appeal

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 2, 1991

Mr. George P. Lynch
Attorney at Law
100 West Monroe Street, 19th Floor
Chicago, IL 60603

No. 71804—People State of Illinois, respondent, v. Norman Bosek, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1991.

Order of the Supreme Court of Illinois
Staying the Mandate
No. 71804 — Filed October 25, 1991

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Respondent,

v.

NORMAN BOSEK,

Defendant-Petitioner.

Appeal from the Illinois Appellate Court, Second District, Case No. 2-89-1151. Appeal from the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois. The Honorable John Bowman, Judge Presiding.

ORDER

This matter has come for consideration upon the motion of petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of the Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

Jury Instructions

The defendant is presumed to be innocent of the charge against him of first degree murder. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving that the defendant is guilty of first degree murder, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.

If the State proves beyond a reasonable doubt that the defendant is guilty of first degree murder, the defendant then has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder, and not guilty of first degree murder. In deciding whether a mitigating factor is present, you should consider all of the evidence bearing on this question.

When you retire to the jury room, you first will elect one of your members as your foreperson. He or she will preside during your deliberations on your verdict.

Your agreement on a verdict must be unanimous. Your verdict must be in writing and signed by all of you, including your foreperson.

The defendant is charged with the offense of first degree murder. Under the law, a person charged with first degree murder may be found not guilty, or may be found guilty of first degree murder or guilty of second degree murder.

If you find that the State has proved the defendant guilty beyond a reasonable doubt of the offense of first degree murder, you must then decide whether the defendant has proved by a preponderance of the evidence that the defendant is guilty of the lesser offense of second degree murder.

Accordingly, you will be provided with three verdict forms: "not guilty", "guilty of first degree murder", and "guilty of second degree murder."

From these three verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated. Do not write on the other two verdict forms. Sign only one verdict form.

To sustain the charge of first degree murder, the State must prove each of the following propositions:

First: That the defendant performed the acts which caused the death of Lucian W. Gilbert; and

Second: That when the defendant did so, he intended to kill or do great bodily harm to Lucian W. Gilbert; or he knew that his acts would cause death to Lucian W. Gilbert; or he knew that his acts created a strong probability of death or great bodily harm to Lucian W. Gilbert; and

Third: That the defendant was not justified in using the force which he used.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty and your deliberation should end.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you should go on with your deliberations to decide whether a mitigating factor has been proved so that the defendant is guilty of the lesser offense of second degree murder instead of first degree murder.

You may not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless you have first determined that the State has proved beyond a reasonable doubt each of the propositions of first degree murder.

The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree

murder instead of first degree murder. By this I mean that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true that the following mitigating factor was present; that the defendant, at the time he performed the acts which caused the death of Lucian W. Gilbert, believed the circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that the defendant has proved by a preponderance of the evidence that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of second degree murder.

If you find from your consideration of all the evidence that the defendant has not proved by a preponderance of the evidence that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of first degree murder.

A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.

However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another.

A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable.

A person is not justified in the use of force if he initially provokes the use of force against himself with the intent to use that force as an excuse to inflict great bodily harm upon the other person.

A person who initially provokes the use of force against himself is justified in the use of force only if the force used against him is so great that he reasonably believes he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person.

The phrase "preponderance of the evidence" means whether, considering all the evidence in the case, the proposition on which the defendant has the burden of proof is more probably true than not true.